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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1264

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION and LOCAL 1291, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,

Petitioners,

v.

PHILADELPHIA MARINE TRADE ASSOCIATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, International Longshoremen's Association and Local 1291, International Longshoremen's Association, respectfully pray that a Writ of Certiorari issue for review of the final judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled matter on December 27, 1967. Said judgment reverses an Order of the District Court for the Eastern District of Pennsylvania, which denied respondent's motion to compel petitioner to submit a dispute to arbitration, and remanded the case for entry of judgment compelling such submission.

OPINIONS AND ORDERS OF THE COURTS BELOW.

The Opinion and Order of the District Court for the Eastern District of Pennsylvania, reported at — F. Supp. —, is printed as Appendix B hereto (p. 14). The Opinion of the Court of Appeals for the Third Circuit, reported at — F. 2d —, is printed as Appendix C hereto (p. 20). The Judgment of said Court of Appeals is printed as Appendix D hereto (p. 30).

JURISDICTION.

The Judgment of the Court of Appeals was entered on December 27, 1967 (p. 30). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED.

1. In ordering a labor union to submit to arbitration an issue which the collective bargaining agreement reserves for negotiation between the parties, and in failing to apply the real intent of the contract as agreed by employer's counsel at trial, did not the Court below commit fundamental error by substantially over-applying the "trend to arbitration", so as to conflict directly with the contract-oriented national labor policy announced by this Court?

2. In setting aside the specific findings of fact by the Trial Judge and in interpreting the labor agreement without reference to such findings, did not the Court below violate Federal Rule 52(a)?

PROCEDURAL RULE INVOLVED.

The Federal Rule of Civil Procedure involved is Rule 52(a).

STATEMENT OF THE CASE.

This case arose as an action by respondent, Philadelphia Marine Trade Association (PMTA), an employers' organization, to require petitioner, Local 1291, International Longshoremen's Association (ILA) to submit to arbitration the question whether, under the collective bargaining agreement, the employers could compel longshoremen to change their established method by unloading two pallets of frozen meat in a draft, rather than one pallet as theretofore. The union insisted that such a change in operation should be negotiated, and not arbitrated, under the specific provision of the agreement.

The labor agreement contains an arbitration clause (No. 28); but it also contains a clause (No. 13(d)), specifically excepting from arbitration questions involving changes in established methods of operation and the application of technological advancements, providing that these shall be subject to negotiation.[1] Further, the arbitration clause itself excepts from its operation "disputes or grievances arising under the terms and conditions of paragraph 13(d) hereof".

The testimony on behalf of petitioner was that since pallets were first used in the Port of Philadelphia, the established custom was that only one pallet of cargo was lifted per draft, until the instant dispute arose.[2] Testimony on behalf of the employers was that in the twenty years since the inception of the use of pallets in Philadelphia there were several dozen incidents of two-pallet drafts. The Trial Judge found, after hearing and seeing all

1. These provisions are set out hereinafter as Appendix E (p. 32).

2. There was an exception, in 1967, when an attempt at two-pallet drafts was made, but ceased when a union official appeared.

the witnesses, that the use of two-pallet drafts was "very sporadic and not on a regular basis", that "the union and its officials were not aware of the occasional unloading of two pallets to a draft until the incident [here involved]"; that "the established practice . . . has been through the use of one pallet drafts", and that "it has not been an established practice . . . to unload frozen meat or other cargo through the use of two pallet drafts." (17). The Trial Judge concluded that the Court had jurisdiction to determine arbitrability under the contract, and that since the method attempted by the employers would be a change in established procedure, it was subject to negotiation, and not arbitration.

The Court of Appeals reversed, holding that the Trial Judge had misinterpreted the effect of the labor contract, ignoring the admission by respondent's counsel at the trial as to the effect of the contract, and refusing to apply the findings of fact made by the Trial Judge.

REASONS FOR GRANTING THE WRIT.

I. Arbitration Is a Matter of Contract. The Decision of the Court of Appeals, Ignoring the Intent of the Labor Agreement as Conceded by Employers at Trial, and Compelling the Union to Arbitrate an Issue Which the Labor Agreement Makes Negotiable, Conflicts With the National Labor Policy Announced by This Court: United Steelworkers v. Warrior & Gulf Navigation Co., 363 U. S. 574; Wiley & Sons v. Livingston, 376 U. S. 543.

At trial in this case, counsel for the employers agreed that if the use of two pallets per draft *was* a change in the established method in the Port, then paragraph 13(d) of the labor agreement *would* control, and the issue would have to be *negotiated* and not arbitrated.[3] Thus, the agreed factual issue at the trial was the nature of the "established method of operation" and whether the employers' demand would be a change therein. The legal proposition urged by the employers was that the question of arbitrability, itself, was to be decided by the arbitrator, and not by the Court.[4]

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3. At the trial, in pin-pointing the legal and factual issues, counsel for the employers said:

> "It was our position, Your Honor, that if 13(d) applied there would have to be one of the three things among others, in operation at that time. Either there would have to be a change in the established work method, or there would have to be a change in the number of men which had heretofore handled the cargo, or this operation of two pallets to a draft would have to constitute a technological advancement in method or machinery." (Appendix, Court of Appeals, 19a).

4. Counsel for the employers said, in his opening remarks that "This question as to whether 13(d) applied, or whether 13(a) and (c) applied should be submitted to arbitration." (Appendix, Court of Appeals, 20a). Further, he said:

> "And so, Your Honor, in this case, we say that whether or not this operation is covered under Section 13(d) or not is a question for the arbitrator to decide, and that is the reason why we ask this dispute be submitted to arbitration." (23a)

The Trial Judge determined that the *Court* has jurisdiction to decide whether under the agreement a party is bound to arbitrate, and what issues he must arbitrate, as consistently held by this Court.[5] After hearing the testimony and having opportunity to see the witnesses, the Trial Judge found that the employers' order *would* be a change of method, and, therefore, negotiable, and not arbitrable, stating:

> "We can say *with positive assurance* in this case that the dispute in question is not covered by arbitration." (Emphasis supplied.) (18).

However, the Court of Appeals, over-applying the federal arbitration policy to the point of conflict with its very contractual basis, ignored the real meaning and intent of the negotiation provision of paragraph 13(d) of the contract, as admitted by the employers' counsel, and interpreted it as providing a double standard: that a change in established method desired by the *union* must be *negotiated,* but that a change desired by the *employers* should be *arbitrated.* The equal application of the contract to both sides, clearly the intention of the contract, and so admitted by the employers, has thus been destroyed. This wholly conflicts with the policy announced by this Court in the Steelworkers Trilogy,[6] and, *Wiley & Sons v. Livingston,* 376 U. S. 543, 547, 11 L. Ed. 2d 898, 903 (1964). This Court has emphasized that no matter how strongly

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5. *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U. S. 574, 582, 583 (n. 7), 80 S. Ct. 1347, 4 L. Ed. 2d 1409, 1417, 1418; *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 241, 82 S. Ct. 1318, 8 L. Ed. 2d 462, 465; *John Wiley & Sons., Inc. v. Livingston, etc.,* 376 U. S. 543, 546-547, 84 S. Ct. 909, 11 L. Ed. 2d 898, 902-903.

6. *United Steelworkers v. Enterprise Wheel and Car Corp.,* 363 U. S. 593, 4 L. Ed. 2d 1424 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U. S. 574, 4 L. Ed. 2d 1409 (1960); *United Steelworkers v. American Manufacturing Co.,* 363 U. S. 564, 4 L. Ed. 2d 1403 (1960).

may be expressed the policy favoring arbitration, "arbitration is a matter of contract" and that

> ". . . a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. . . ." (*United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U. S. 574, 582, 4 L. Ed. 2d 1409, 1417).

In *Wiley*, this Court said:

> " 'Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties' . . . The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." (376 U. S. at 547, 11 L. Ed. 2d at 903).

It was stated by this Court that although the arbitration clause may be of "wide breadth", the existence of "a number of specific exceptions" thereto will be given effect if applicable (376 U. S. at 553, 11 L. Ed. 2d at 906).

In the instant case, the specific exceptions to the duty to arbitrate were specifically set forth by counsel for the employers at the trial, in accordance with the excepting clause of the labor contract. The real intent of the negotiation clause 13(d), was conceded and expressed in detail in delineating the legal and factual issues. Counsel for the employers said that 13(d) would apply if one of three facts should appear: that the two-pallet draft would be "a change in the established work method"; that there would be "a change in the number of men" or that the two-pallet operation would be "a technological advancement in method or machinery" (Appendix, Court of Appeals, 19a). He

stated that PMTA took the position, "that there was no change in the established method of operation; . . . there was no change in the number of men handling this cargo", and that handling two pallets per draft "was not a technological advancement in either machinery or method, and for that reason Clause 13(d) did not apply." (Appendix, Court of Appeals, 19a). Thus, the factual issue was clarified, and upon that basis the action was tried, and the Trial Judge made his specific findings of fact. There was no change in this position in argument before the Court of Appeals. The failure of the Court of Appeals to give effect to the agreed intent of the contract, which was the guideline of the trial, was as much a refusal to measure arbitrability according to contract as if the contract itself spelled out this detailed intent in so many words.

In reaching the meaning and effect of such agreement, the real question to be answered is not an artificially or artfully derived interpretation, but the actual intent of the parties. It is clear by agreement here, that the parties intended that any desired change in established methods or the institution of technological advances must be negotiated and not arbitrated. A double-standard meaning as declared by the Court of Appeals clashes with the mutuality which is solely consistent with collective bargaining. It is reasonable and expected that the parties desired to retain for their *own* consideration and decision all questions concerning changes in job opportunities and cost of operation arising out of changes in methods of operation. This intent must be given full effect, and may not be subjugated to a policy that is itself conditioned upon the intent and agreement of the parties.[7]

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7. Indeed, the preservation to negotiation between union and employer of factors directly affecting job opportunities, such as methodological or technological changes, is the sine qua non of collective bargaining, and any delegation of such issues to an arbitrator would be an abdication by the union from its duty of representation. Thus,

The national labor policy, as expressed by this Court, favors arbitration, but *only* where the intent of the parties so provides. To compel arbitration contrary to the agreement of the parties is in direct conflict with such national policy. This Court must warily guard against over-application by the lower courts of the currently expressed arbitration principle. It must not be broadly applied as *the* method of decision. This Court has based its announcements of policy upon the intent and agreement of the parties. The instant case provides an example of the dangers which must be watched for and avoided. If the decision of the Court of Appeals is not reviewed, a dangerous precedent will have been set.[8]

II. The Findings of Fact by the Trial Judge Were Not Clearly Erroneous. The Decision of the Court of Appeals Ignoring These Findings and Interpreting the Labor Agreement Without Reference Thereto Violated F. R. C. P. 52(a).

F. R. C. P. 52(a) provides:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

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such specific exclusionary clauses from arbitration have grown in number as arbitration clauses have grown. See, e.g., *Gulf and South American Steamship Co. v. National Maritime Union*, 360 F. 2d 63 (5 Cir., 1966), where the issue of "manning scale", resulting from automation of ships, was specifically excluded from arbitration, and the Court held that the arbitrator was without jurisdiction.

8. Since arbitration deprives the judiciary of jurisdiction over the particular controversy, an agreement providing for arbitration must be strictly adhered to; it must be carefully construed so as not to force a party to submit to arbitration a question which he did not intend to submit. *Brotherhood of Railway, etc., Clerks v. Norfolk Southern Railway*, 143 F. 2d 1015, 1017 (4 Cir., 1944); *B. Fernandez, etc. v. Rickert Rice Mills*, 119 F. 2d 809, 815 (1 Cir., 1941).

The agreed issue of fact central to the trial herein was whether or not the use of a two-pallet draft would be a change in the established method of operation in the Port of Philadelphia. There was much testimony on both sides, most of which was conflicting, and all of which required evaluation by the Trial Judge.

At best, the employers' testimony was that during the 20-odd year period involved, a mere sprinkling of two-pallet drafts occurred. The Trial Judge observed that even assuming the veracity of plaintiff's evidence, whereas "literally thousands of ships have loaded and discharged cargo in the Port of Philadelphia since World War II when pallets were first used . . . the plaintiff could name only several dozen incidents at most when two pallet drafts were employed. . . ."; that "this has been very sporadic". (18). The impression presented, even if believed, was at most, as described by the District Judge, a "sporadic and clandestine use of two pallets to a draft" which "is certainly not an established method of operation under the labor contract". (18). Further, in any view, the evidence is clear, as the Court found, that on "the few times that the two pallet method was used, it was done without the knowledge of the union or its officials". (18).

The Court of Appeals, refusing to accept the fact-findings by the Trial Judge, concluded that "the two pallet operation, *whatever its extent,* was in existence prior to the 1964 employment contract" (28). There was no conclusion that the District Judge's findings were clearly erroneous; indeed, under the testimony, such a conclusion could not be made. In so acting, the Court of Appeals set aside the Trial Judge's findings in violation of Rule 52(a).

CONCLUSION.

The action of the Court of Appeals sets a dangerous precedent of over-emphasis of the policy favoring arbitration. The law, as stated by this Court, is *not* that all issues between the union and employer must be arbitrated; to the contrary, only those issues agreed by the parties to be subject to arbitration are to be arbitrated. In the instant case, issues involving changes in an established method of procedure were specifically excepted and confined to negotiation. The decision of the Court of Appeals, ignoring this specific intent, results in an *excessive* application of the arbitration policy. This was substantial error, and should be reviewed and reversed, and the order of the District Judge reinstated.

Respectfully submitted,

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